

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs February 4, 2003

**STATE OF TENNESSEE v. KENNY CARSON COCKRELL, JR.**

**Direct Appeal from the Circuit Court for Madison County**  
**Nos. 01-374 & 01-375     Donald H. Allen, Judge**

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**No. W2002-00545-CCA-R3-CD - Filed April 2, 2003**

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The Defendant, Kenny Carson Cockrell, Jr., pled guilty to six counts of aggravated robbery and one count of attempted aggravated robbery. After a hearing, the trial court sentenced the Defendant to ten years on one of the aggravated robberies, nine years each on the other five aggravated robberies, and four and one-half years on the attempted aggravated robbery. The trial court further ordered that the ten year sentence and two of the nine year sentences be served consecutively to the others, for an effective sentence of twenty-eight years. The Defendant now appeals both the length of the terms and the imposition of consecutive sentencing. We modify the Defendant's sentences with the result being an effective sentence of twenty-five years. In all other respects, we affirm the judgment of the trial court.

**Tenn. R. App. P. Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MC-GEE OGLE, JJ., joined.

Clifford K. McGown, Jr.; George Morton Gooze and Vanessa D. King, Assistant Public Defenders, for the appellant, Kenny Carson Cockrell, Jr.

Paul G. Summers, Attorney General and Reporter; P. Robin Dixon, Jr., Assistant Attorney General; Jerry Woodall, District Attorney General; and Shaun A. Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Defendant's guilty pleas arose out of a series of armed robberies which the Defendant committed with his cousin over a two week period in December 2000. The robberies each took place at a convenience store. At the first robbery, the Defendant entered the store and pointed a handgun at the clerk, demanding money. She complied, handing the money to the Defendant's accomplice. The two then drove away. In the subsequent robberies, the Defendant provided the handgun, waited in the car to drive away after the robbery, and received a portion of the proceeds.

At one of the convenience stores, the clerk refused to cooperate and the Defendant's accomplice fled the store without any money.

The Defendant was twenty years old at the time of the robberies, and these were his first felony convictions. As an adult, his only prior record was a traffic offense. As a juvenile, he had four traffic offenses, one theft under \$500, and one vandalism under \$500. The Defendant denied having ever used illegal drugs.

Proof at the sentencing hearing established that the Defendant is borderline mentally retarded. He obtained a special education diploma from his high school in 1999. His employment history is negligible. Although never married, the Defendant has two young sons. The Defendant was living with his mother when he was arrested.

The police first apprehended the Defendant's accomplice, who confessed and implicated the Defendant. When the Defendant heard that the police were looking for him, he immediately turned himself in and made a full confession. He subsequently pled guilty and expressed remorse for his crimes.

At the sentencing hearing, several of the Defendant's relatives testified and described their surprise at the Defendant's criminal behavior. They reported that this activity was totally out of character, and they were convinced that the Defendant had learned his lesson while in jail and would never resume his criminal career if given a second chance. They explained that the Defendant was "slow" and easily influenced by others. The Defendant did not testify, but he did make a statement in the presentence report, which includes the following:

I am very sorry for my participation in these crimes, and I will make restitution to the victims as soon as I am able.

I was influenced by my cousin Daryl to participate in these crimes. If I had fully understood the gravity of the offenses, I would not have participated in the robberies.

The trial court found that three enhancement factors applied to each of the Defendant's sentences:

The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

The defendant had no hesitation about committing a crime when the risk to human life was high; [and]

The crime[s] [were] committed under circumstances under which the potential for bodily injury to a victim was great.

Tenn. Code Ann. § 40-35-114(2), (11), (17) (Supp. 2002). The court applied as an additional enhancement factor to the robbery in which the Defendant entered the store and pointed the gun at the clerk that he “was a leader in the commission of an offense involving two (2) or more criminal actors.” Id. § 40-35-114(3) (Supp. 2002).

In mitigation, the trial court found that the Defendant, because of his youth and reduced mental capacity, lacked substantial judgment in committing these offenses. See id. § 40-35-113(6).<sup>1</sup> The trial court also found as mitigating factors that the Defendant cooperated fully with the police, made a full confession, and pled guilty; that he did not use the gun in any but one of the crimes; and that the Defendant is one easily influenced by others. See id. § 40-35-113(13). The trial court also noted the Defendant’s statement in the presentence report.

The trial court sentenced the Defendant as a Range I offender. Aggravated robbery is a Class B felony, see id. § 39-13-402(b), and the sentencing range is therefore eight to twelve years. See id. § 40-35-112(a)(2). The presumptive sentence for a Class B felony is the minimum in the range, increased by applicable enhancement factors and decreased by applicable mitigating factors. See id. § 40-35-210(c), (e). Based on the enhancement and mitigating factors it found applicable, the trial court sentenced the Defendant to a mid-range sentence of ten years for the robbery in which the Defendant pointed the gun at the clerk and to sentences of nine years for each of the remaining robberies. For the attempted aggravated robbery, a Class C felony, see id. § 39-12-107(a), the sentencing range is three to six years. See id. § 40-35-112(a)(3). For this crime, the trial court sentenced the Defendant to four and one-half years.

The Defendant now contends that the trial court erred in its application of enhancement factors, thereby imposing excessive terms.

When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for

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<sup>1</sup>Tennessee Code Annotated subsection 40-35-113(6) provides as a mitigating factor that “[t]he defendant, because of youth or old age, lacked substantial judgment in committing the offense.” The trial court found that the Defendant’s reduced mental capacity contributed to his lack of substantial judgment. The trial court specifically refused to apply as a mitigating factor that the Defendant “was suffering from a mental . . . condition that significantly reduced [his] culpability for the offense.” Id. § 40-35-113(8).

rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Brewer, 875 S.W.2d 298, 302 (Tenn. Crim. App. 1993); State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988).

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. See State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

We agree with the Defendant that the trial court erred when it applied as an enhancement factor that the Defendant had no hesitation about committing these crimes when the risk to human life was high. See id. § 40-35-114(11) (Supp. 2002). This Court has previously found that the offense of aggravated robbery committed with a deadly weapon, see Tenn. Code Ann. § 39-13-402(a)(1), necessarily entails a high risk to human life. See State v. Claybrooks, 910 S.W.2d 868, 872-73 (Tenn. Crim. App. 1994). This enhancement factor is therefore inherent in the offense and should not be applied to enhance the sentence. See id. Similarly, this Court recognized in Claybrooks that the offense of armed robbery includes as an essential element that it is a crime committed under circumstances under which the potential for bodily injury to a victim is great. See id. Accordingly, neither of these enhancement factors should have been applied.

The trial court gave only "slight" weight to the enhancement factor for the Defendant's previous criminal history. Because there is only one enhancement factor to be weighed against several mitigating factors, the Defendant is entitled to a reduction in the nine year sentences to the minimum sentence of eight years. With respect to the conviction for which the Defendant received a ten year term, that sentence was also properly enhanced by the Defendant's actions in leading the commission of that crime. Accordingly, we reduce that sentence to nine years, one year above the minimum. With respect to the attempted aggravated robbery, we reduce that sentence to the minimum of three years.

The Defendant also contends that the trial court erred in imposing consecutive sentences. The trial court imposed partial consecutive sentences on the dual bases that the Defendant is "an offender whose record of criminal activity is extensive," and "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(a)(2), (4). The trial court based both of these two findings on the instant offenses.

Consecutive sentences imposed on the basis of an extensive record of criminal activity frequently look to the defendant's prior record in addition to the offenses at issue. See State v. Palmer, 10 S.W.3d 638, 648 (Tenn. Crim. App. 1999). The multiple offenses for which a defendant is being sentenced may, however, serve in and of themselves to establish an extensive record. Here, the Defendant committed six aggravated robberies and one attempted aggravated robbery over the

course of two weeks. Each of the robberies was committed at a different convenience store. The violent spree came to a halt only after the Defendant's accomplice attempted a subsequent robbery with someone else and was shot during the attempt. Although the Defendant's career as a participant in armed robberies did not last for an extensive time period, it resulted in convictions of seven violent offenses. We agree with the trial court that the Defendant's crime spree resulted in a record of extensive criminal activity. The trial court did not err in this regard.

The trial court also determined, based on the instant offenses, that the Defendant is "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." We agree that the evidence supports this finding. Each of the robberies was committed at a retail store open to the public. The Defendant provided the gun for six robberies and one attempted robbery. The Defendant himself pointed the gun at one of the convenience store clerks who was robbed. The same gun was used in the final attempted robbery by the Defendant's accomplice, during which shots were fired and the accomplice was shot. There is no question that armed robberies of convenience stores frequently result in loss of life. The Defendant's repeated participation in these crimes earned him the sobriquet, "dangerous offender."

In addition to finding statutory grounds for the imposition of consecutive sentences, the trial court must also find that the length of the effective sentence imposed is "justly deserved in relation to the seriousness of the offense" and is "no greater than that deserved for the offense committed." State v. Lane, 3 S.W.3d 456, 460 (Tenn. 1999) (citations omitted). Additionally, before imposing consecutive sentences on the basis that a defendant is a dangerous offender, the trial court must further find particular facts which demonstrate that consecutive sentencing serves to protect society "from further . . . aggravated criminal conduct." Id. at 461 (quoting State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995)). In this case, the trial court stated:

There is no doubt in my mind that had it not been for the fact that [the Defendant's accomplice] got shot and got arrested on January the 22nd of 2000 (sic) that [the Defendant's accomplice] would have committed -- continued committing crimes. And there's no doubt in my mind that [the Defendant] would have been right back with him at some point committing more crimes, had they -- had they not been stopped and had all of this not come to an end in January of 2001.

The trial court also specifically found that the effective sentence was "reasonably related to the severity of all the offenses that have been committed."

On the basis of its findings, the trial court ordered the Defendant's sentences for the robbery in which he held the gun on the clerk, and two of the other aggravated robberies in which he participated, to run consecutively for an effective sentence of twenty-eight years. Because the record supports the imposition of the consecutive sentences ordered, we find no abuse of discretion. However, because we have reduced the Defendant's ten year sentence to nine years, and his nine year sentences to eight years, the total effective sentence is modified to twenty-five years.

In all other respects, the judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE